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No. 01-531

In The

Supreme Court of the United States

FARM & GROVE REALTY COMPANY,

Petitioner,

v.

BREVARD COUNTY, FLORIDA, THE NATURE CONSERVANCY, and KEVIN JUDD,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal For The State Of Florida, Fifth District

BRIEF FOR THE RESPONDENTS, THE NATURE CONSERVANCY AND KEVIN JUDD, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether any basis for review by this Court pursuant to its certiorari jurisdiction is presented by the *per curiam* affirmance, without opinion, by the Florida Fifth District Court of Appeal of the state trial court's entry of a summary judgment against the Petitioner on its takings and due process claims against Respondents, The Nature Conservancy and Kevin Judd,[1] where the state court decision could have rested on a non-federal ground and, under the facts presented, no cause of action under 42 U.S.C. §1983 existed. (Petitioner's Questions 4-6).

(2) Whether any basis for review by this Court pursuant to its certiorari jurisdiction is presented by the *per curiam* affirmance, without opinion, by the Florida Fifth District Court of Appeal of the state trial court's entry of a summary judgment against Petitioner on its conspiracy claim against these Respondents where the state court decision could have rested on a non-federal ground, and, under the facts presented, no federal cause of action for conspiracy was established. (Petitioner's Question 7).

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[1] The present Brief in Opposition is presented on behalf of the Respondents, The Nature Conservancy and Kevin Judd and addresses only those issues presented in the Petition for Writ of Certiorari relevant to these Respondents. Respondent Brevard County, Florida, will be submitting a separate Brief in Opposition addressing the issues relevant to it.

CORPORATE DISCLOSURE STATEMENT

The Nature Conservancy, Inc. has no parent corporation, and no non-wholly owned subsidiaries.

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The *per curiam* decision of the District Court of Appeal for the State of Florida, Fifth District, is published in a table without reported opinion at 785 So. 2d 498 (Fla. 5th DCA 2001). The Order on Motion for Summary Judgment of the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida, is unreported and is found at AI-5-6 of Petitioner's Appendix.

JURISDICTION

The Judgment of the District Court of Appeal was entered on April 17, 2001. The Petition for Writ of Certiorari was filed on July 16, 2001. The jurisdiction of the Court is sought to be invoked under 28 U.S.C. § 1257(A).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution as well as Brevard County Ordinances 80-50, 91-08, 91-12 and 93-27 are set forth in Petitioner's Appendix. 42 U.S.C. § 1983 reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

Petitioner's statement of the facts is replete with misstatements, unsupported inferences and improper argument. A representative example is found at page 10 of the Petition where Petitioner asserts: "The County and TNC [The Nature Conservancy], specifically trained Judd to follow methods to obtain property at less than fair market value. (Judd Depo. at 31 & 32.)" No such testimony is found in this portion of Mr. Judd's deposition. (R-2979-2980).[2] Nor is it found anywhere else in his deposition. Respondents, The Nature Conservancy ("TNC") and Kevin Judd (hereafter "Respondents"), rather than seeking to respond to each and every mischaracterization of the record, submit the following statement as an accurate rendition of the material facts necessary to the consideration of the questions presented.

Action was brought by the Petitioner, Farm and Grove Realty Company, on its Second Amended Complaint for inverse condemnation and for damages sounding in three counts: Count I was a count for inverse condemnation against Co-Respondent Brevard County, Florida; Count II was a count seeking damages pursuant to 42 U.S.C. § 1983 as against Respondents and Co-

[2] "R" refers to the Record on Appeal before the Florida Fifth District Court of Appeal.

Respondent for violation of the takings and due process clauses of the Fifth and Fourteenth Amendments; and Count III sought damages for conspiracy as against Respondents and Co-Respondent. (AII-2-19). Summary judgment was entered against Petitioner and for Respondents on Counts II and III of the Second Amended Complaint, effectively removing Respondents from the remainder of the case which went forward against Co-Respondent on Count I. (AI-5-6). Petitioner appealed the granting of summary judgment to the District Court of Appeal for the State of Florida, Fifth District. While the appeal was pending, the claim against Co-Respondent Brevard County for inverse condemnation was tried. After trial, final judgment was entered for the County and against Petitioner on the inverse condemnation claim. (AI-10-12). That Final Judgment was also appealed and was consolidated with the appeal from the granting of summary judgment to Respondents. The District Court of Appeal's *per curiam* affirmance without opinion was entered as to the consolidated appeals. (AI-9).

In essence, Petitioner alleged in its Second Amended Complaint that the County illegally and unconstitutionally destroyed the market for property the Petitioner was selling by designating the property for acquisition as scrub jay habitat and by restricting building on Petitioner's property through unreasonable road ordinances. It was further alleged that Respondents conspired with the County in its effort to destroy the market for Petitioner's property and engaged in unfair negotiating practices toward a goal of purchasing that property below fair market value.

Petitioner was the owner of vacant, non-contiguous, unimproved lots of approximately 1.5 acres scattered throughout a 6,700 lot plat. (R 1356). Since prior to Petitioner's purchase of its lots in 1981, all of the lots listed in its Second Amended Complaint have been subject to oversight by the United States Fish and Wildlife Service ("USFWS") pursuant to the Endangered Species Act, 16 U.S.C. § 1540.

Pursuant to the Act, the County had studied several plans to protect the habitat of the Florida scrub jay. A proposed ordinance that would mitigate scrub jay impacts, referred to as the Scrub Jay Plan, was considered but never enacted by the County. (R 3144). As such, no County ordinance existed or exists prohibiting or limiting the development of Petitioner's property due to the existence of scrub jay or scrub jay habitat. (R 3146-3147). The only development limitations placed upon Petitioner's property relating to its status as a scrub jay habitat were the permitting requirements of the USFWS. (R 2019, 3428-3429). A plan that was adopted by the County was what it called its Environmentally Endangered Lands program ("EEL"). This program called for the County to purchase environmentally sensitive land from willing sellers, including scrub jay habitat. (R 3136-3139). The EEL program, as a willing buyer/willing seller program, neither prohibited nor regulated the development of property targeted for purchase. (R 3146-3147).

While there existed no environmental regulations, federal, state or local, which would preclude the development of Petitioner's lots, County ordinances have, at all relevant times, required that lots have road access prior to the issuance of building permits. These ordinances

are applicable to all properties in the County. (R 1379-1452, 1906-1910; AI-14-17). At the time Petitioner purchased its lots in 1981, there was no formal mechanism in place to obtain or compel County funding for the construction of access roads to Petitioner's lots. Subsequently, in 1991, the County enacted an ordinance allowing for the establishment of Municipal Service Benefit Units ("MSBUs") which would permit the owners of lands located in the same right of way to accept assessments against their property in exchange for the County providing the capital funding necessary to construct the roads. (AI-25-49). Also in 1991, the County passed Ordinance 91-08 which allowed for the issuance of building permits where access was provided to lots by either private roads, 25 foot wide easements or unpaved roads to properties within one quarter mile of a County maintained roadway. (AI-18-24). Eventually, the MSBU Ordinance was modified and this type of funding was no longer available for the construction of paved roads except as provided by Ordinance 91-08, as amended. However, access by unpaved roads, exclusive easements and private roads remained available at all times as allowable access to obtain a building permit. (AI-50-58).

Subsequent to the enactment of Ordinance 93-27, the County entered into a contract with Respondent The Nature Conservancy (TNC) to assist in the implementation of the EEL program. This contract was also entered into well after Petitioner's property had been identified as a scrub jay habitat. (R 2205-2225, 3149-3150). Neither

TNC nor Respondent Judd[3] played any policy making role in identifying land for acquisition under the EEL program. Nor was TNC or Judd involved in the management of preservation lands acquired by the County. Under the contract, the scope of TNC's involvement was to act as a purchasing agent for the County. If TNC was to manage the land once it was purchased, a separate agreement would be required. (R 2219, 3027; Second Amended Complaint, Exhibit "K"). Similarly, neither Respondent hired or contracted the appraisers whose opinions would form the basis for any offers to purchase property pursuant to the EEL program. Respondents' role in the acquisition process was limited to negotiating the purchase of lands identified by the County and to be paid for by government funds. (R 2970, 3150, 3154).

As part of the general effort to preserve environmentally valuable lands, federal, state and local governments, along with private conservation groups, often fund the purchase of land for preservation purposes. Developers, in order to obtain development approvals, are often required to set aside property or purchase and dedicate property for preservation to offset the impact of their development activities. The need for such "mitigation property" for purchase by developers in Brevard County has created a substantial market for scrub jay habitat, i.e., for the purchase and sale of lots such as those owned by Petitioner. (R 3407, 3449, 3477-3478). The price typically

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[3] At about the time that TNC and the County entered into this agreement, Judd was hired by TNC as a field representative. (R 2964-2966).

paid by such a developer for scrub jay land in Brevard County was approximately $5,000.00 an acre. (R 3426).

Against this backdrop, Petitioner's property was identified by the County as scrub jay habitat appropriate for acquisition under the EEL program. (R 1355-1378). TNC contacted Petitioner to determine its willingness to sell its property to the County. (R 3030-3031). As required by statutes governing state purchase of property, appraisals were ordered by the County. (R 2967, 2969). Prior to the completion of those appraisals TNC made a verbal offer of $2,000.00 per acre for the purchase of Petitioner's property, an offer less than the appraised value. (R 2993). This offer was rejected and, subsequent to receipt of the appraisals, the County substantially increased its offer. This offer, too, was rejected. (R 3207-3208, 3476). Petitioner's counter-proposals for the sale of its property always included claims for damage allegedly caused by the regulatory actions of the County. These counter-offers were refused. (R 3314-3316). Petitioner then filed the present action.

After the filing of the action, Petitioner sold a number of the lots described in its complaint for mitigation purposes receiving approximately $5,000.00 per acre. Petitioner chose to stop marketing many of its lots, however, because it believed that they could not be marketed as homesites. (R 3252, 3345-3347, 3477-3478).

Petitioner never applied for the creation of an MSBU for a paved road, but was granted an MSBU for unpaved road construction. As of the date of the summary judgment order, applications to construct unpaved roads had not yet been acted upon by the County. (R 2548-2574).

Petitioners never made any improvements to its lots, the lots having always been sold as raw land.

What is *not* found in the record which was before the trial court at the time of its order granting summary judgment are any facts or even reasonable inferences to support claims that Respondents conspired with or acted together with the County to "rig" wetland determinations, acreage computations, appraisals or offering prices to cause Petitioner to sell its property at an inadequate price; knowledge by Respondents of any of the County's decisions concerning development of building or zoning policies concerning road ordinances, MSBU ordinances, or management of property acquired for preservation; evidence that the EEL program, as enacted, prevented development of land; applications by Petitioner, or denials by the County, of building permits for any of Petitioner's property; denial of plans for putting in roads, sewer, water or any other improvements for Petitioner's property; or any actions taken by Petitioner, including seeking variances from developmental regulations, to develop the property or make it more developable. The only evidence in the record demonstrates that Petitioner sought only to continue to pursue its original strategy of selling undeveloped lots. (R 3208-3209, 1-3508).

ARGUMENT

1. Petitioner contends (Pet. 20-25) that the trial court's ruling granting summary judgment in favor of Respondents on Petitioner's Fifth and Fourteenth Amendment takings claims, as upheld by the Florida

appellate court, was necessarily based on ripeness grounds, i.e., that Petitioner had not availed itself of existing adequate state remedies, and that the state courts' decisions in this regard present important federal questions that require review by this Court. To the contrary, Petitioner failed to establish, and the record does not support, its claim that Florida's Fifth District Court of Appeal, the state court of last resort, in its *per curiam* affirmance of the trial court, has decided *any* federal question, much less an important federal question justifying review by this Court. To the extent that federal questions were raised before and decided by the state appellate court, they were properly decided.

The issues presented were decided in the trial court on a motion for summary judgment. Under both the federal and state standards, summary judgment is appropriate where there are no material facts in dispute and the evidence before the court establishes that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Ingram v. Brookins*, 597 So. 2d 385 (Fla. 2d DCA 1992); Fed. R. Civ. P. 56(c); Fla. R. Civ. P. 1.510(c). The party opposing a motion for summary judgment must present evidence, not simply legal argument, demonstrating the existence of a disputed issue of material fact. See, e.g., *Gray v. Darien*, 927 F.2d 69 (2d Cir. 1991), *cert. denied*, 502 U.S. 856 (1991); *Woodruff v. Government Employees Insurance Company*, 669 So. 2d 1114 (Fla. 1st DCA 1996). Moreover, summary judgment is a useful and utilized tool in dispensing with cases alleging conspiracy or violations of constitutional and federal law where the undisputed material facts support judgment as

a matter of law. See, e.g., *Village of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997) (summary judgment upheld on due process takings claim); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995) (summary judgment upheld on claim that regulations were an unconstitutional taking and violated substantive due process); *Paedae v. Escambia County*, 709 So. 2d 575 (Fla. 1st DCA 1998) (summary judgment upheld on Section 1983 taking and state damages claims); *Andrews v. McGowan*, 739 So. 2d 132 (Fla. 5th DCA 1999) (summary judgment upheld on conspiracy claim).

Petitioner has, in essence, addressed only one potential basis of the state appellate court's decision, to wit: that Petitioner's Section 1983 claims were not ripe due to the existence of an adequate state remedy of which the Petitioner did not avail itself.[4]

Where a state appellate court has given no reason for its decision, this Court has deemed it improper to accept jurisdiction if the state court decision "might have rested on a non-federal ground . . . . " *Ellis v. Dixon*, 349 U.S. 458, 459 (1955); *Piccirillo v. New York*, 400 U.S. 548 (1978); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). The record presented to the state court here supports its decision on several grounds, both federal and non-federal. As such, there is no basis for review by this Court. Likewise, if there are no facts in the record to support federal claims being advanced, this Court has declined to

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[4] The Fifth District Court of Appeal affirmed the order of the trial court without an opinion. The trial court's order granting summary judgment also did not set forth specific reasoning for its decision. (AI-5-6)

exercise its certiorari jurisdiction. *Ellis v. Dixon, supra* at 463-464.

In the first instance, there is simply no evidence in the record to support a claim that the Respondents, as private actors, participated in the series of events alleged by the Petitioner as amounting to a taking of its property aside from their role in ultimately seeking to negotiate a purchase of that property. The actions complained of were taken by the County pursuant to the County's powers and authority and were taken prior to the County's engagement of the services of Respondents. Putting aside all questions of ripeness, state action, "under color of law" requirements, the extent of regulation and just compensation, the record is simply devoid of any actions on the part of Respondents that would support a claim against them. Since the record would support the state courts' granting and affirmance of summary judgment on behalf of Respondents on this evidentiary basis alone, no federal question is presented.

Another argument presented to the state appellate court in support of the trial court's summary judgment was that even if certain governmental decisions had been made which were incorrect and which had some adverse effect on Petitioner's right to use its property in one particular manner, this did not rise to the level of a Section 1983 violation. This argument was made on the state court authority of *Paedae v. Escambia County, supra,* and *Jacobi v. City of Miami Beach,* 678 So. 2d 1365 (3d DCA 1996). This argument is not addressed in the Petition for Writ of Certiorari. Petitioner has thus waived any objection to this argument, an argument that could have supported the state appellate court decision in this case.

The ripeness issue – the only issue actually addressed in the Petition – also supports the state appellate court's decision in this case. Before Petitioner could bring a claim based upon the Fifth and Fourteenth Amendment Just Compensation Clause, it was first required to pursue and exhaust its available state remedy. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). As stated by this Court in *Williamson County, id.* at 194-195: "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." See also *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). Florida does have an adequate state remedy, that being an action for inverse condemnation. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994). Since Florida recognizes the right to bring a cause of action for inverse condemnation, and Petitioner did bring such an action but did not complete it before bringing its Section 1983 action against Respondents, the action against Respondents was not ripe for review and summary judgment was properly entered.

Petitioner argues that Florida's remedy is inadequate for three reasons. Petitioner first argues (Pet. 21-22) that Florida's inverse condemnation remedy is inadequate because a state claim for inverse condemnation cannot be brought against a private entity acting in the role of a state actor. In Petitioner's view, the fact that inverse condemnation is an action only against a governmental entity thus preventing it from suing Respondents individually and seeking punitive damages renders Florida's

remedy inadequate. Petitioner cites neither authority nor logic in support of that position.

First, the evidence did not support Petitioner's position that Respondents were state actors. Private actors have been deemed state actors under Section 1983 only when one of three tests is met: 1) the public function test; 2) the state compulsion test; or 3) the nexus/join action test. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Willis v. University Health Services, Inc.*, 993 F.2d 837, 840 (11th Cir. 1993), *cert. denied*, 510 U.S. 976 (1993); *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). Recently, this Court has identified excessive "public entwinement" as a basis for determining whether private actors may be considered state actors for Section 1983 purposes. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). None of these tests was met here. The negotiation for the purchase of land from a willing seller is not a function which is traditionally within the exclusive prerogative of the state. The fact that the function being exercised is serving the public is not sufficient to render Respondents state actors. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). As such, the public function test is not met. See *Harvey v. Harvey, supra; National Broadcasting Company, Inc. v. Communications Workers of America, AFL-CIO*, 860 F.2d 1022 (11th Cir. 1988). Similarly, there is no evidence in the record to support the claim that the state compulsion test is met. While Respondents were hired to negotiate favorable sales with willing sellers, there is no evidence that they were "willful participant[s] in joint activity with the State or its agents" insofar as the allegedly illegal acts of the County were concerned. *Lugar, supra* at 941. Finally, the record is devoid of facts to

establish the symbiotic relationship, which must involve the alleged constitutional violation, to support a finding that there existed such a "public entwinement" as to convert Respondents into state actors for Section 1983 purposes. Certainly, any "public entwinement" that existed here between Respondents and the County was significantly less, both in quantity and quality, than that existing in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988) where the NCAA was found not to be a state actor even though a university, which was undoubtedly a state actor, delegated many of its own functions to the NCAA. See also, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987). Respondents' only role in the complained of actions came at the end when they were engaged to negotiate a price for the property, not earlier when the regulatory actions which purportedly depressed the value of the property were engaged in by the County.

Nonetheless, the inability of Petitioner to bring an action against Respondents in state court *for inverse condemnation* does not render the state court remedy inadequate. The remedy spoken of by this Court in *Williamson County* is for "just compensation" for the taking of property by government. Florida provides a remedy, inverse condemnation, for Petitioner to seek just compensation from Brevard County. That in the *inverse condemnation* action Petitioner is precluded from suing private individuals and seeking punitive damages does not render the state remedy inadequate. Petitioner was free to seek other state court remedies against Respondents for any alleged wrongful conduct on their part which harmed it or interfered with its economic or property rights and, in a

timely and properly brought Section 1983 action Petitioner would also have been able to avail itself of the remedy of punitive damages if the facts would support such a remedy.

Petitioner next contends (Pet. 22-23) that the Florida inverse condemnation remedy is inadequate because Petitioner's claim for inverse condemnation cannot be tried before a jury. The procedure under Florida law is for a judge to first decide if there has been a taking before ordering a jury to be impaneled to determine just compensation. *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988). Petitioner contends that in light of this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), any state remedy that does not provide for a jury trial on the issue of taking is inadequate. *City of Monterey*, however, not only does not support this position, but expressly contradicts it. The Court specifically noted that the Seventh Amendment right to a jury trial does not apply to the states. *Id.* at 719. Moreover, the Court's analysis reaffirms the position that if an adequate post-deprivation remedy to provide for just compensation exists, then no constitutional injury is occasioned by the taking alone and, as such, the jury trial issue does not come into play. *Id.* at 710. The Court has never held that for a state remedy to be adequate in this context it must provide for a full jury trial on all issues. Indeed, the Court has consistently held to the contrary. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543-544 (1981) (specifically noting that the fact that the state's remedies provide an action only against the state, no punitive damages and no right to a trial by jury does

not render the state's remedies inadequate).[5] Federal Courts of Appeals, including the Eleventh Circuit Court of Appeals which includes Florida, have applied the *Williamson County* state remedy requirement in cases analogous to the present case where a claim is made that a benefit once available to the property owner (like the MSBU ordinance here) has been taken away by government action thereby affecting the value of the property. See, e.g., *Anthony v. Franklin County*, 799 F.2d 681 (11th Cir. 1986) (termination of a county-operated ferry service to an otherwise inaccessible island); *Four Seasons Apartment v. City of Mayfield Heights, Ohio*, 775 F.2d 150 (6th Cir. 1985) (city's rescinding of a previously approved building permit). Accordingly, Petitioner's lack of entitlement to a jury trial under Florida's inverse condemnation law does not render the state remedy inadequate.

Petitioner also contends (Pet. 22-25) that Florida's remedies are inadequate in forcing mitigation sales. This issue is simply miscast and misstated. Contrary to Petitioner's representation (Pet. 23), the trial court did not hold that Petitioner's economically viable use of its property was not denied due to the possibility of "mitigation sales." As previously noted, the trial court's reasoning for its granting of summary judgment was not explained and it said nothing about mitigation sales. Similarly, the appellate court's *per curiam* affirmance was silent as to its reasoning. Nor is there any evidence in the record that

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[5] That portion of *Parratt v. Taylor* which held that negligence could give rise to an action under 42 U.S.C. § 1983 in the prison context was overruled by the Court in *Daniels v. Williams*, 474 U.S. 327 (1986).

any actions of these Respondents "forced" Petitioner into mitigation sales or that these Respondents had anything to do with establishing the system of mitigation sales. Nor have these Respondents at any time asserted that "mitigation sales" are a state remedy that Petitioner was required to pursue before it could bring a Section 1983 action. This argument is wholly without merit.

Finally, Petitioner has totally ignored its failure to address whether the County would interpret its ordinances to allow building permits on Petitioner's lots or allow any variances from those ordinances, i.e., its failure to meet the other ripeness requirement that it receive a final agency action. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra.* This, too, provides a basis for the state court's decision – an independent basis not challenged by Petitioner in this Court.

2. The gravamen of Petitioner's contentions regarding the conspiracy count (Pet. 25-30) is that Respondents conspired with Co-Respondent Brevard County to deny Petitioner just compensation for the taking of its property and equal protection[6] and that, as such, Respondents

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[6] Any argument Petitioner may have had with regard to equal protection was waived below and is not preserved for consideration in this Court. The Order of Dismissal in Petitioner's original action against Brevard County dismissed the equal protection count of that complaint with leave to amend. (AI-3-4) Petitioner did not seek to replead the equal protection count and has made no showing that it could not do so. The Second Amended Complaint, the operative pleading in this cause, does not even mention equal protection. In these circumstances, the equal protection issue is waived as a matter

were state actors acting under color of law for purposes of 42 U.S.C. § 1983.

Petitioner spends a great deal of time seeking to establish that Respondents and Brevard County were acting under color of state law. As noted above, the facts in this case fail to establish that Respondents were state actors. Respondents were clearly independent contractors, not employees of the County. *Harvey v. Harvey, supra.* Moreover, to the extent that the County took actions through the establishment of its EEL program and the modification of its MSBU ordinance allegedly rendering Petitioner's property sufficiently devalued due to regulation to implicate the Just Compensation Clause, Respondents, who were hired only to negotiate purchases with willing sellers, came on the scene *after* the purportedly actionable conduct. See, e.g., *Bendiburg v. Dempsey,* 909 F.2d 463, 469 (11th Cir. 1990). The well established authorities of this Court and the various federal Courts of Appeals simply do not support Petitioner's conclusory statement that ". . . TNC and Judd are state actors because they were executing a contractual agreement to acquire the real property of [Petitioner] and nearby landowners for wildlife preservation." (Pet. 27). More must be proven to establish Respondents as state actors, particularly state actors who are sought to be held liable for Section 1983 violations required to be taken under color of state law.

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of state law. *Arthur v. Hillsborough County Board of Criminal Justice,* 588 So. 2d 236 (Fla. 2d DCA 1991).

Petitioner's argument that there exist issues of material fact with respect to evidence of a conspiracy between Respondents and the County also fails to provide support for the granting of certiorari in this case. In the first place, the facts, even as inaccurately stated as they are by Petitioner, establish no actions taken by the Respondents other than their entry into a contract with the County to serve as a purchasing agent and their entry into negotiations pursuant to that contract. A review of the documents referenced by Petitioner – TNC's Statement of Qualifications and the contract between the County and TNC[7] – establish them as standard, lawful documents irrespective of the sinister spin the Petitioner seeks to place on them. Thus, even Petitioner's recitation of the alleged facts presented to the trial court fail to establish the essentials of a complaint for civil conspiracy. See *Kent v. Kent*, 431 So. 2d 279, 281 (Fla. 5th DCA 1983).

Of equal significance is the fact that the determination of whether the facts in the record at the time of the trial court's order of summary judgment truly supported that order or not, is a matter which, while of importance to the parties, does not raise issues of federal significance for this Court's determination.

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[7] Exhibits "I" and "K" to the Second Amended Complaint.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certioari should be denied.

Respectfully submitted this 26th day of October, 2001.

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